Reserved on 14.03.2022
Delivered on 21.04.2022

Court No. - 46

Case :- CRIMINAL APPEAL No. - 7021 of 2010

Appellant :- Surya Udaivir Alias Sonu
Respondent :- State of U.P.
Counsel for Appellant :- Brij Raj Singh,Dhirendra Kumar Pal,Jitendra Kumar Mishra,Kuldeep Singh Yadav,Prakash Chandra Srivastava,V.K. Sharma
Counsel for Respondent :- Govt.Advocate,N.K.Maurya,P.K. Chauhan

Hon'ble Mrs. Sunita Agarwal,J.
Hon'ble Mrs. Sadhna Rani (Thakur),J.

[By Justice Sadhna Rani (Thakur)]

This appeal has been preferred against the judgement and order dated 08.10.2010 passed by the Sessions Judge, Mainpuri in Sessions Trial No. 364 of 2006 arising out of Case Crime No. 292 of 2006 (State Vs. Surya Udaivir alias Sonu and others) convicting and sentencing the appellant only under Section 302 I.P.C. with life imprisonment and fine of Rs. 25,000/- and in default of payment of fine, the accused has to undergo one year additional imprisonment.

The facts germane to this appeal are that on 16.06.2006 at 20.30 hours the first informant Ram Vilas lodged a first information report scribed by Satish Chandra Saxena at the Police Station Bewar District Mainpuri as Case Crime No. 292 of 2006 with the assertion that on 16.06.2006 he along with his cousin Subhash Chandra had gone to attend a feast in the village Bagpur. At about 6.00 p.m., when they were about to leave, Rajendra Singh, Rajiv and Surya Udaiveer Shatru Daman Singh alias Sonu suddenly came near Subhash Chandra and fired at him by a country made pistol. Subhash Chandra died on the spot. The accused persons fled away firing shots by their country made pistols. This incident created panic amongst the persons present in the 'Bhandara'. Ashok, Bantu, Mahendra s/o Babu Ram and all the persons present on the spot witnessed the incident.

After registration of the first information report as Case Crime No. 292 of 2006 the investigation was taken over by the S.I. Udaibhan Singh, who after reaching at the spot, recorded the statement of the complainant and because of night the inquest could only be conducted in the morning of 17.06.2006 at 7.15 a.m. The Investigating Officer prepared the inquest report, site plan and other necessary documents, sent the dead body for post mortem, took samples of blood stained and normal soil, prepared memo in that regard. Memo was also prepared regarding recovery of 20 pairs of shoes and 26 pairs of slippers, which were left by the mob on the spot due to panic. Additional statement of the complainant, the statements of the witnesses and statements of the accused persons in jail after their surrender were also recorded. The investigation culminated into filing of the charge sheet.

After receiving the charge sheet, the concerned Magistrate took the cognizance of the offence, supplied necessary copies of documents to the accused persons and committed the case to the Court of Sessions. The Sessions Court framed charges against all the three accused persons Rajendra, Rajeev and Surya Udai Veer Shatru Daman Singh alias Sonu on 08.01.2007 under Section 302/34 I.P.C.. The accused persons denied the charges and pleaded not guilty.

The prosecution produced as many as five witnesses in support of its case, P.W. 1 - Ram Vilas and P.W. 2 - Ashok Kumar are witnesses of fact who claim themselves to be the eye witnesses. Ram Vilas has proved his complaint. P.W. 3 - Dr. U.C. Chaturvedi conducted the post mortem on the dead body of the deceased Subhash Chandra and proved the post mortem report, P.W. 4 – S.I. Udaibhan Singh is the Investigating Officer, who has proved the inquest report and documents relating to the same, site plan, memo of blood stained and plain soil, memo of shoes and slippers recovered from the spot and the charge sheet. P.W. 5 is the Constable Iqbal Singh, who has proved the first information report and the General Diary prepared by HCP Jawahar Lal, as HCP Jawahar Lal is reported to be dead.

As documentary evidence the prosecution produced complaint of the

complainant as Exhibit Ka-1, post mortem report as Exhibit Ka-2, inquest report as Exhibit Ka-3, challan dead body as Exhibit Ka-4, letter to R.I. as Exhibit Ka-5, letter to C.M.O. as Exhibit Ka-6, photo dead body as Exhibit Ka-7, site plan as Exhibit Ka-8, memo regarding blood stained and normal soil as Exhibit Ka-9, memo of recovery regarding shoes and slippers as Exhibit Ka-10, charge sheet as Exhibit Ka-11, chik F.I.R. as Exhibit Ka-12, copy of G.D. as Exhibit Ka-13. The report of forensic science laboratory dated 30.10.2006 is also on the record, as it is a public document it has not been exhibited by the trial court.

The statement of the accused persons were recorded under Section 313 Cr.P.C. wherein they denied the whole evidence produced by the prosecution and claimed to be innocent.

The accused persons have produced Constable 411 Ramendra Singh as D.W. 1 and SSI Udai Bhan Singh as D.W. 2 in their defence. After hearing the rival arguments and going through the above evidence the lower court passed the impugned judgement and order dated 08.10.2010 and acquitted Rajendra Singh and Rajiv from the charges under Section 302/34 I.P.C. extending them the benefit of doubt and convicted the present appellant Surya Udaiveer @ Sonu as mentioned above.

Feeling aggrieved by this judgement and order, the present appeal has been filed by the appellant. He assailed the impugned judgement on the grounds that the first information report has been sent to the Magistrate concerned with a delay of four days. G.D. was written by Jawahar Lal while he was not on duty at that time. Till the time of moving the application for the police custody remand on 22.06.2006, the Investigating Officer had not recorded even the statement of the first informant. This all shows that the first information report is ante time. There is no motive for the murder of Subhash Chandra before the appellant. The first informant - P.W. 1 is the cousin of the deceased, hence, he is an interested witness and P.W. 2 - Ashok Kumar is a chance witness who is inimical to the accused persons as he had contested the elections against the family members of the appellant, so the statements of both the witnesses are unworthy of reliance. Apart from this

their statements are contradictory. Admittedly in the 'Bhandara' there was a crowd of 300-400 people but no independent witness had been produced by the prosecution. In the first information report, general role had been assigned to all the accused persons regarding causing the offences. It is only during the evidence that the present appellant was assigned the specific role of firing on the deceased. The injuries mentioned in the post mortem report do not tally with the ocular evidence adduced by the prosecution. The doctor has opined that the injuries sustained by the deceased cannot be inflicted by a single shot, whereas the witnesses have stated that the appellant made a single fire which caused two injuries resulting in the death of the deceased. Thus, the conviction and sentence against the appellant is improper and is not sustainable in the eyes of law.

Per contra learned A.G.A. has controverted the above arguments and has argued that the evidence produced by the prosecution is cogent and uncontroverted which has fully supported the prosecution case and the guilt of the appellant is proved beyond all reasonable doubts. The contradictions pointed out from the defence side are minor in nature. Some discrepancies, omissions and improvements are bound to occur in the natural statements of the witnesses, which show that the witnesses had not been tutored. On the basis of these minor contradictions, the whole prosecution case cannot be discarded. Considering the time gap between the incident and the dates of recording of statements of the witnesses specifically keeping in view the fact that P.W. 1 is an illiterate, rustic villager, these minor contradictions are liable to be ignored.

Heard the rival arguments of the learned counsel for the appellant and learned A.G.A. and perused the record.

The death of the deceased Subhash Chandra is an admitted fact. As per the post mortem report the cause of death is shock and hemorrhage as a result of ante mortem fire-arm injuries. This fact is also admitted to both the parties. The main point of determination in this case is whether this murder was committed by the appellant and that too in the way as disclosed by the prosecution witnesses?

It is argued by the learned counsel for the appellant that no independent witness had been produced by the prosecution, admittedly, the first informant is the cousin of the deceased hence an interested witness. P.W. 2 Ashok Kumar came later on, after hearing the news of murder, so he was not an eye witness. Otherwise also, he is a chance witness. Thus, the evidence of both the witnesses cannot be relied upon to hold the present appellant guilty.

The Apex Court in the judgment of ***Vijendra Singh Vs. State of U.P. (2017) 11 SCC 129*** has explained the terms "relative witness', "interested witness' and "chance witness' and has held that a relative is a natural witness. A close relative who is a natural witness cannot be disregarded as interested witness. The term "interested' postulates that witness must have some interest in having the accused somehow or other convicted for some animus or some other reasons. It is opined that it cannot be laid down as an invariable rule that the evidence of an interested witness can never form the basis of conviction unless corroborated to a material extent, to any material particular, by an independent evidence. All that is necessary is that the evidence of interested witness must be subjected to a careful scrutiny and accepted with caution. If on such scrutiny the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient in the circumstance of a particular case to base a conviction thereupon. It is also opined that there is no reason why a relative / interested witness would implicate the accused for the murder of their relative leaving behind the real culprit.

Recently the Apex Court in ***Rajesh Yadav and another Vs. State of U.P. (2022) SCC Online SC 150*** held that a relative witness cannot be termed as an interested witness per se, one has to see the place of occurrence along with other circumstance. A relative witness can also be a natural witness. It was observed that if an offence is committed within the precincts of the house of the deceased, the presence of his family members cannot be ruled out as they assume the position of natural witness. A relative witness would become an interested witness only when he desires of implicating the

accused in rendering conviction on purposes. When the court is convinced with the quality of the evidence produced, notwithstanding the classification as related / interested witness it becomes the best evidence, such testimony being natural adding to the degree of probability, the court is to make reliance upon it in proving of fact.

In another recent judgment in ***Rajesh Prasad V. State of Bihar and another (2022) SCC Online SC 23,*** the Apex Court held that the testimony of an interested witness cannot be discarded on that ground alone. It would only require the court to be more cautious, scrutinize the evidence carefully, evidence otherwise cogent and convincing cannot be rejected on the ground that there was no independent witness though the occurrence had taken place on a busy road, but there should be circumstances where the witnesses are interested and manner of occurrence as described requires corroboration by independent witness also. Ultimately, therefore, it shall all depend upon the facts and circumstances of the case. It has also to be kept in mind that it shall be those closed to the deceased who shall be most keen that the real culprits be booked.

Regarding the chance witness, it is held by the Apex Court that a chance witness is the one who happens to be on the place of occurrence of an offence by chance, and therefore, not as a matter of course. In other words, he is not expected to be in said place. A person walking on a street witnessing the commission of the offence can be a chance witness, merely because a witness happens to see an occurrence by chance, his testimony cannot be eschewed though a little more scrutiny may be required at times.

In the case at hand, it is said that the incident took place at 'Bhandara' where admittedly 300-400 persons were present but allegedly no independent witness had been produced by the prosecution. P.W. 1 – the first informant is admittedly the cousin of the deceased and P.W. 2 Ashok Kumar is a chance witness. The reason of non production of an independent witness is clear that the deceased and the appellant both belong to the same village and normally the people show reluctance to become a witness in a murder case where the parties belong to the same village.

It is argued by the learned A.G.A. that it is admitted fact that the P.W. 1 the first informant though is the cousin of the deceased but he is not inimical with the appellant. The P.W. 2 is a chance witness so he can be said to be an independent witness. In our opinion, in the event of reluctance of general public to be a witness, a close relative is the only natural witness and being a close relative to the deceased he will try to prosecute the real culprit by saying the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody screening the real culprit to be punished.

Thus, the only requirement is that the testimony of relative/interested/chance witness should be examined cautiously.

If we go through the statement of P.W. 1 and P.W. 2, the only witnesses of fact produced from the prosecution side, P.W. 1 has proved the complaint registered by him and stated that on 16.06.2006 at 6.00 p.m. the people were enjoying feast (Bhandara) at village Bagpur and he himself along with Subhash Chandra was present there. Subhash Chandra had already taken his feast, when he and Subhash Chandra were about to leave the place at about 6.00 p.m. the present appellant along with two co-accused surrounded his cousin Subhash Chandra, the present appellant took the country made pistol out of his waist and fired on Subhash Chandra, who had died on the spot. This act of the appellant caused panic in the 'Bhandara'. The people started running after leaving their shoes and slippers. The accused persons also fled away firing the shots. This incident was witnessed by Ashok, Bantu and Mahendra and other persons present in the 'Bhandara'. Subhash Chandra was having a license of fair price shop and the accused Sonu wanted to take that license. He tried his best to get cancelled the license of Subhash Chandra, but when he could not succeed so he committed the murder of Subhash Chandra.

P.W. 2 - Ashok Kumar has also supported the version of P.W. 1 and stated that on 16.06.2006 he had gone to have a feast at 'Bhandara' in the village Subhash Chandra and various other persons were present there. After having feast at around 6.00 p.m., when he was looking after the arrangement

of 'Bhandara', Rajendra and Rajiv surrounded Subhash Chandra. The present appellant took out his country made pistol and with the intention of causing the death of Subhash Chandra fired on him. The fire hit Subhash Chandra on his chest. He fell down on the spot and within a while he died. A panic was created in the feast. The people started running after leaving their shoes and slippers. The accused persons also ran away firing the shots. This incident was witnessed by him, Ram Vilas and many other persons present at the spot.

It is argued by the learned counsel for the appellant that there was no motive to commit the murder of the deceased Subhash Chandra. In the first information report also, motive behind the incident has not been mentioned. It is only in the evidence of P.W. 1 and 2 that they had disclosed the motive.

If we go through the statement of P.W.1 in this connection, he has stated in his examination-in-chief that Subhash Chandra was the dealer of the fair price shop in the village and the present appellant wanted to take that license in his name. He tried a lot to get the license of the fair price shop of the deceased cancelled. When he could not succeed in his motive, he committed the murder of Subhash Chandra. In his cross examination also, P.W. 1 stated that with a view to get this licence of the deceased cancelled, a meeting of the gaon sabha was held in the village and an application in that regard was also moved.

P.W.-2 though has not stated anything about the motive in his examination-in-chief but in his cross examination he has admitted that he had helped the deceased in getting the fair price shop license in his favour. During his tenure as Pradhan of the village, the deceased was holding the licence of the fair price shop continuously for ten years. P.W. 2 has also stated that after completion of his tenure, the present village Pradhan wanted to cancel the licence of the fair price shop in the name of the deceased Subhash Chandra. This witness has denied the suggestion of the defence counsel that the villagers had ever complained of irregularities in distribution of the essential commodities during the tenure of deceased Subhash.

Learned counsel for the appellant has drawn the attention of the court towards the cross examination of the P.W.-1 wherein he has admitted that the present appellant was having shops at Kushalpur- Intersection and those shops had been given on rents. The accused Rajendra was having 35-40 bighas of agricultural land, though he had no orchard. P.W.-2 has also made an admission, in his cross examination, about the shops of the appellant and that the appellant was having 35-40 bighas of agricultural land. He has also admitted that the present appellant was the only son of his father and he was a farmer by profession.

On the basis of these statements of the P.W. 1 and 2, it is argued by the learned counsel for the appellant that when the appellant and his father Rajendra are having sufficient means of income, there was no need to have the fair price shop licence.

Though this motive had not been denied by the appellant in his statement under section 313 Cr.P.C. but in support of its version the prosecution has not produced any evidence that the appellant wanted to have the licence of the fair price shop in his name or he called any panchayat or made complaint in that regard to the authorities.

It has also been argued by the learned counsel for the appellant that P.W.-1 had borrowed Rs. 5,000/- from the accused Rajendra in the year 2003 and had not returned this amount till date and in order to misappropriate the money he has falsely implicated the appellant and other accused persons. The P.W.-1 has admitted in his cross examination that he had taken Rs. 1800/- as loan from the son of one Indrapal who had asked him to return the amount to the present appellant and out of the amount of Rs. 1800/- he had already returned Rs. 1500/- to the appellant and rest was due, but according to P.W.-1, the present appellant never demanded the money back so it cannot be said that because of the demand he had falsely implicated the appellant in the present case. Again neither any suggestion in that regard had been given by the defence counsel to the prosecution witnesses nor any evidence had been produced. Neither there is any version of the appellant under section 313 Cr.P.C., nor the demand of Rs. 300/- can be said to be a guiding force,

so as to persuade that the P.W.-1 had motive to falsely implicate the present appellant in the offence and let the real culprit go free.

It has been argued by the learned counsel for the appellant that P.W.-2 is inimical to the appellant's father Rajendra who was also co-accused in the present case and so he had falsely deposed against the appellant. Though P.W. 2, in his statement, had admitted that he had contested election of village pradhan, but at the same time, he has stated that in the year 1995 Rajendra Singh did not contest election and denied the suggestion that he had won the election in the year 1995 against the co accused Rajendra Singh who happens to be the father of the present appellant. P.W.-1 also stated that he had no enmity with the appellant.

We may note at the same time, the enmity is a double edged weapon which may be the basis of false implication as well as the basis of the commission of the offence. In the presence of an eye witness the motive becomes irrelevant. At the same time, on the basis of enmity only presumption cannot be drawn that the appellant has been falsely implicated.

Thus, neither the motive on behalf of the prosecution nor the enmity of the witnesses with those of accused persons so as to implead them falsely can be said to have been proved by the parties.

In a catena of judgments, the Apex Court had held that the motive becomes irrelevant if the eye witnesses adduce trustworthy evidence. In judgment of **Bhagirathi Vs. State of Haryana 1996 ACC 653 SC** and **Bhram Swaroop and another Vs. State of U.P. 2011 (1) ALJ 231 (SC),** it was held that if the eye witness is trustworthy and believed by the court, then motive is irrelevant. If we go through the statements of the P.W. -1 and 2 who are said to be the eye witnesses of the incident, both of them have supported the version of the first information report in their statements.

In the judgment **(2020) 9 SCC 524, Stalin Vs. State** Represented by the Inspector of Police, the Apex Court held that motive becomes irrelevant if the testimony of eye witnesses is found credible. In the recent judgment **Surinder Singh Vs. State (Union Territory of Chandigarh 2021 SCC On Line SC 1135, t**he Apex Court ruled that in case the prosecution is not able

to discover an impelling motive, that could not reflect upon the credibility of a witness, proved to be a reliable eyewitness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eyewitnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eyewitness is rendered untrustworthy."

Thus, to bring home the guilt of the accused, the evidence of the prosecution witness must be proved to be trustworthy.

It has also been argued by the learned counsel for the appellant that the first information report is ante time because the scribe of the first information report Satish Chandra Saxena, the real brother of the deceased, was not present at the spot at the time of incident. He came only after receiving the information of the murder of his brother and it was only then he scribed the first information report. Though, it is admitted fact that scribe of the first information report Satish Chandra Saxena resides in Agra but on the date of incident, he had come to the village as P.W.-1 has stated in the cross examination that on the day of the incident Satish Chandra Sexena came from Agra. The scribe came to the village between 10.00 to 11.00 a.m. and there was no specific reason for his coming. It has also been asserted in the cross examination that on specific occasion the scribe usually and normally came to the village. Thus, in the absence of any assertion in the statement of the appellant under section 313 Cr.P.C. and any other evidence on his behalf it cannot be said that scribe Satish Chandra was not present in the village on the date of the incident.

It is further argued by the learned counsel for the appellant that the P.W. 1 Ram Vilas was also not present **at the relevant time of the incident** as P.W. 1 himself had admitted that he did not even try to lift Subhash Chandra neither did he try to give him first aid or artificial breathing.

According to the learned counsel for the appellant it was not possible for a person if his cousin was dying before him that he would not try to save him either by taking him to the hospital or by giving him artificial breathing. In our considered opinion, this argument of the learned counsel for the appellant is not appreciable as P.W. 1 and 2 both in their cross examinations stated that Subhash Chandra died immediately after being shot. If the person is shot dead on the spot then it is useless to take him to the hospital. This clearly dispels the argument of the learned counsel for the appellant that had the P.W. 1 present on the spot he would have taken his cousin to the hospital to save his life.

The other ground for discarding presence of P.W. 1 and 2 at the spot at the time of incident is that the F.I.R. is ante time and that in the site plan, the Investigating Officer had not shown the place of presence of the witnesses. If we go through the site map, it is true that the place of witnessing the incident by the witnesses has not been shown therein but this can be said to be a flaw on the part of the Investigating Officer. As per the statement of the Investigating Officer, before preparation of the site plan on 17.06.2006, he had noted the statement of P.W. 1 on 16.06.2006 and in his statement P.W. 1 the complainant had deposed himself to be an eye witness of the incident. In the court also, both P.W. 1 and 2 had deposed to be the eye witnesses of the incident and there is nothing on record to controvert the statement of these two witnesses, hence the argument that P.W. 1 and 2 were not present at the spot at the time of incident, also fails.

Another reason of pleading the FIR to be ante time is that the first information report was sent to the Magistrate concerned on 20.6.2006 while as per law it was to be sent within 24 hours of the lodging of an F.I.R. A perusal of the chik FIR shows that the first information report was sent to the Magistrate concerned on 20.6.2006 i.e. 4 days after its registration. It is held by the Apex Court in **Ram Vilas Vs. State of M.P. AIR 2015 SC 3362** that in the absence of prejudice shown to the accused, the omission of the police to submit report to the Magistrate in time would not vitiate the trial. The purpose of FIR is to set the criminal law into motion. If there is any

delay in sending the first information report to the Magistrate concerned, it can be said to be a flaw on the part of the Investigating Officer for which the prosecution cannot suffer. Moreover, from the facts of the case, it cannot be said that delay in sending the FIR to the area Magistrate has caused prejudice to the accused.

Another reason for claiming the first information report to be ante time by the learned counsel for the appellant is that till the inquest report was prepared the first information report had not been lodged. If we go through the inquest report which was said to have started at 7.15 a.m. on 17.6.2016, it contains both the case crime number and the names of the accused persons and also the gist of the offence, so this argument of the learned counsel for the appellant is also ruled out.

Last ground for claiming the first information report to be ante time is that the duty of DW.1 Ramendra Singh was from 8.00 P.M. on 16.6.2006 till 6.00 a.m. on 17.6.2006 in the police station Bewar District Mainpuri. Ramendra Singh had been produced in the court as D.W. 1 who had stated in his examination-in-chief that on 16.6.2006 at 20.28 hours, he made endorsement in the G.D. The argument of the learned counsel for the appellant is that the present F.I.R. had been registered at 20.30 hours on 16.6.2006, as per P.W.-5, the F.I.R. was registered by constable Jawahar Lal. Though, the DW-1 has stated that the F.I.R. at 20.30 hours was written by Ashfaq who was sitting with him for his assistance but there is no such endorsement in the G.D. that Ashfaq was assisting Ramendra (D.W. 1) on 16.6.2006. It is further argued by the learned counsel for the appellant that as per P.W.-5, if the G.D. and chik F.I.R. of this case were written by constable Jawahar Lal. then also the chik F.I.R. becomes ante time because the chik F.I.R. and G.D. can be said to be registered by Jawahar Lal in his hand writing on 17.6.2006 when he came back on his duty again. D.W.-1 has admitted that the G.D. of this case was not written by him. He stated that various officials remained in the police station to assist in the work of each other and officials use to perform the work whatever work came before them.

It is true that as per prosecution version, chik FIR is said to have been registered at 20.30 hours on 16.6.2006 by H.C.P. Jawahar Lal and the G.D. No. 29 has also been written by him at the same time. The fact that D.W.-1 Ramendra Singh was on duty as constable clerk on 16.6.2006 from 8.00 p.m. till 6.00 a.m. on 17.6.2006 is not disputed but according to him he made Ashfaq sitting along with him for his help. The F.I.R. and G.D. being scribed by Ashfaq is not his defence version. Thus, the probability cannot be ruled out that H.C.P. Jawahar Lal who was present at that time on the same post lodged the first information report and prepared the G.D. No. 29 at 20.30 hours. As HCP Jawahar Lal had died, the Chik FIR and G.D. had been proved by the constable 324 Ekbal Singh as P.W.-5 in the court which makes it clear that at that time though Ramendra Singh (D.W.1) was on duty as constable clerk but Jawahar lal was also posted in the same police station and he was available at that time so he registered chik FIR and prepared the G.D.No. 29 of the case at 20.30 hours in his hand writing. This probability is confirmed by the statement of D.W.-1 constable Ramendra Singh that the officials in the police station performed the work whatever work came before them.

It has also been claimed that the GD page '91' is in duplicate which creates a doubt, but the Defence Witness D.W.-1 in his examination-in-Chief itself has admitted that it was a printing mistake because after these two pages the next page number is '93' which shows that in place of '92' wrongly and repeatedly no. '91' had been printed.

Thus, on the basis of evidence available on record, it is found that the first information report of this case cannot be said to be ante time. Merely on the basis of minor discrepancies or omission and entries of the G.D., the whole prosecution case can not be thrown away.

It is also argued by the learned counsel for the appellant that there is contradiction between the ocular and medical testimonies. In the post mortem report, two injuries are shown on the person of the deceased.

The injury no. 1 is the fire arm wound of entry 1.3 cm x 1.00 cm,x cavity deep over the left side of upper front of chest, 2 cm below the middle

part of clavicle. The wound is surrounded by multiple pin head sized gun powder in an area of 30 x 20 cm. The wound is directing medially downward and backward. The edges are lacerated and inverted.

The injury no. 2 is a Gutter shaped firearm wound of 8 cm x 6 cm on back of left hand. Edges are inverted and lacerated at the outer part of wound and averted and lacerated on the inner part of wound. Ist and IInd metacarpals are fractured. Blackening is present on the outer part of the wound.

The doctor U.C. Chaturvedi, the P.W.-3, who has conducted the post mortem proved the post mortem report in the court and stated that the cause of death was “shock and haemorrhage as a result of ante mortem fire arm injury”. According to the doctor, these injuries were possible to be inflicted on 16.6.2006 at 6.00 p.m. by fire arm. It is stated by the doctor that both the injuries appeared to be inflicted by two separate fires. The doctor has specifically denied these two injuries to be inflicted by one single fire. It is further opined by the doctor that the direction of injury no. 1 was down ward and this injury was possible if a person making fire was standing on the upper side or he made fire by holding his hand up.

Regarding injury no. 2, he has opined that this injury was not down ward. The person inflicting this injury could be said to be standing at the same level to that of the injured. On the basis of the evidence of the doctor, it is argued by the learned counsel for the appellant that as per the prosecution only one fire was made by the present appellant. There is no version that various fires were made on the deceased. It has also been argued that it is not the case of the prosecution that the injury was caused by the present appellant while he was standing on the higher side of the floor or he had made the fire by holding his hands up-side.

In this connection, if we go through the statement of P.W.-1 he has stated that only one fire was made aiming at the deceased and the deceased sustained injury of single fire only. No one fired again upon the deceased. It has also been stated by the P.W.-1 that all the accused persons surrounded the deceased and the present appellant fired at the deceased. The P.W.-1 had

made it clear that at the time of firing accused Rajendrs Singh was towards the north side of the deceased. The witness could not disclose the direction of the present appellant. Further, this witness has stated that the accused person fled away firing the shots after shooting Subhash. How many fires were made, two three, four, fifteen or twenty fires, he could not make clear. The P.W.-2 has stated that 10-12 fires were made by the accused persons. Both the witnesses have stated in their examination-in-chief itself that all the accused persons had surrounded the deceased. It has also been disclosed by the P.W.-2 that when Subhash was surrounded by the accused persons, the deceased was at the East to the feasting persons.

It has also been argued by the learned A.G.A. that the deceased was surrounded by the accused persons and after that the present appellant fired at the deceased. It is not possible for an eye witness specifically in a crowded place at Bhandara that in what manner, on which part of the body and how many fire were shot by the accused persons hitting the deceased. It is up to the accused as to how he fired the shots. The weapon used in the incident is a country made pistol and no definite opinion can be given about the nature of the injury caused by the fire made by this weapon. It is also contended by the learned A.G.A. that if a person tries to defend himself by raising his hand a single fire could cause both injuries. As the fire would hit the back side of palm first and after piercing it, it would hit at the chest.

If we go through the nature of injuries the edges of both injuries are inverted and lacerated and there is fracture in first and second metacarpus and bullet is found inside the chest behind right scapula of the deceased.

It is argued by the learned counsel for the appellant that if the appellant is standing at the eastern side (right side) of the deceased how can he inflict injury on the left side of the deceased. If we go through the statements of P.W. 1 and 2 in that regard, both of them have stated that the accused persons surrounded the deceased and when a person is surrounded then the direction of hitting the bullet cannot be ascertained specifically in a place of feast which is crowded with 3-4 hundred of people.

It is true that there is contradiction between the statement of P.W.-1

and 2, on one side, when they state that the appellant made only one fire which caused the death of the deceased and the statement of the doctor, on the other side, who opined that two injuries had been sustained by the deceased and both the injuries could not be inflicted by one single fire but by two fires only.

Learned A.G.A. has placed reliance on the judgment of the Apex Court in **2010 (3) SCC (Crl.) 1262, Abdul Sayeed Vs. State of Madhya Pradesh**, wherein it has been opined that where there is contradiction between medical and ocular evidence though ocular testimony of witness has greater evidentiary value vis-a-vis medical evidence, but when medical evidence makes ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where medical evidence goes so far that it completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved. Where eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities cannot be accepted as conclusive. Eye witness account requires careful independent assessment and evaluation for its credibility which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as sole touchstone for test of such credibility.

The trial court has also relied upon the judgment of the Apex Court reported in **2009 (64) ACC 920 (Supreme Court), Chhotanney and others Vs. State of U.P.** wherein it has been held that undue primacy could not be attached to hypothetical answers of medical witnesses to exclude the eye witness account which had to be tested independently and not to be treated as ‘variable’ keeping the medical evidence as a ‘constant’ .. when eye witness account is found trustworthy, medical opinion pointing to alternative possibilities is not to be accepted as conclusive.

In the decision **Nijamuddin and others Vs State of U.P., 1991 (28) ACC 655**, in para-11, it was held that where the evidence of witness of fact is absolutely reliable, trustworthy and springs from sources which cannot be termed as tainted and has also stood the acid test of cross examination, medical evidence to the contrary may be ignored. But where the evidence of

witness of fact cannot be termed as wholly reliable and comes from tainted source the medical evidence to the contrary cannot be bruised aside lightly. In the judgment **Menoka Malik and others Vs. State of West Bengal and others, (2019) 18 SCC 721**, the Apex Court has held that it is by now well settled that the medical evidence cannot override the evidence of ocular testimony of the witnesses. If there is a conflict between the ocular testimony and the medical evidence, naturally the ocular testimony prevails. In other words, where the eye witnesses account is found to be trustworthy and credible, medical opinion pointing to alternative possibilities is not accepted as conclusive.

Thus, now, we have to see the reliability of the eye witnesses.

Learned counsel for the appellant has drawn the attention of the court towards various contradictions in the statement of P.W. 1 and 2 and, thus, claimed the statement of these two witnesses to be unreliable.

It is argued that in the first information, the first informant – P.W. 1 has mentioned that he along with the deceased had gone to the feast in the village Bagpur whereas in his statement in the court, he has stated that Subhash Chandra – deceased met him in the 'Bhandara' itself and had gone to the feast alone from his house. P.W. 1 has further stated that he had started for 'Bhandara' at 2.30 or 3.00 p.m. in the day whereas Subhash Chandra came after him in the 'Bhandara' and he had completely denied the fact of the first information report that the deceased Subhash Chandra went to 'Bhandara' along with him. He also stated that the fact mentioned in his statement before the court that he alone went from the village for feasting was true and his version in the first information report that the deceased Subhash Chandra had gone to have a feast along with him, was wrong. If we read the statement of the first informant P.W. 1, adduced in the court and the first information report together, then it can be taken like this that though deceased Subhash Chandra had not gone along with P.W. 1 from the village to have a feast but they were together in the feast so the version in the first information report that P.W. 1 had gone to enjoy the feast along with deceased Subhash Chandra is correct.

It is further argued that P.W. 2 has stated in his statement that at the time of firing at the back of deceased Subhash Chandra who was towards south. P.W. 1 was at his south-western side and the accused persons were standing at the eastern side of the deceased. It is argued by the learned counsel for the appellant that if the accused was standing facing north direction and the accused persons were standing in their right, i.e. towards east the deceased could never get injury at the left side of his chest.

To meet out this argument if we go through the statement of both the witnesses, P.W. 1 and 2 have stated in their statement that the accused persons surrounded the deceased Subhash Chandra before the incident and if the deceased is surrounded by the accused persons, in the crowd of 300-400 persons, neither it can be said that from which direction the shot was made nor it could be described even by the eye witnesses with precision as to how many fires were shot and in what direction or in what manner.

It is further pointed out by the learned counsel for the appellant that in the statement of P.W. 1 it has come that before the incident, P.W. 1 and the deceased had put on their shoes whereas the doctor conducting the post mortem did not mention the existence of the shoes of the deceased in the bundle of articles found from the dead body. It is also claimed that P.W. 1 stated that the police took away the dead body of Subhash Chandra in the night whereas P.W. 2 and P.W. 4 deposed that the dead body remained at the spot for the whole night and the inquest was conducted in the morning on 17.06.2006.

It is also argued that Ram Vilas P.W. 1 had stated that he did not make the effort to lift the deceased Subhash Chandra when he fell down on the ground after being shot. At the same time P.W. 2 has stated contrary to the statement of P.W. 1 that P.W. 1 had lifted deceased Subhash Chandra after he fell on the ground. It is further argued that P.W. 1 has stated that soon after the incident the crowd was gathered on the spot and after some time the public left the spot. This statement of P.W. 2 is self contradictory when he further stated that after the firing a panic was created in the public and people started running here and there. Further the P.W. 2 has stated that the

Investigating Officer had recorded his statement on 16.06.2006 whereas P.W. 4 the Investigating Officer stated that he had recorded the statement of Ashok Kumar P.W. 2 on 17.06.2006.

The above mentioned facts even if are found contradictous some discrepancies are natural in the statement of the witnesses, which in fact prove that the witnesses were not tutored. Except these minor contradictions there is nothing which casts any doubt on the credibility of the witnesses to show that their deposition was not true.

The Apex Court in ***Sachin Kumar SinghrahaVs. State of M.P. (2019) 8 SCC 371*** has observed that the court will have to evaluate the evidence before it, keeping in mind the rustic nature of deposition of the villagers who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be given undue importance while assessing the reliability of oral testimony and the consistency of the prosecution version as a whole.

In ***Rakesh and another Vs. State of Uttar Pradesh & another, (2021) 7 Supreme Court Cases 188***, the Apex Court has held that where the witnesses have been thoroughly examined there may be some minor contradictions, however, minor contradictions which do not go to the root of the matter are not material contradictions and evidence of such witness cannot be brushed aside / disbelieved.

In the case at hand, after examination in chief of P.W. 1 on 18.01.2007 he had been cross examined on 14.02.2007, 22.02.2007 and 23.02.2007 and P.W. 2 Ashok Kumar after his deposition in the examination-in-chief had been cross examined to some length on the same day i.e. on 16.03.2007 and also on 01.05.2007. Thus, if a witness had been cross examined on more than one or two dates that too in a long gap of one month, minor discrepancies are bound to occur in his statement. The Apex Court in the judgement ***Vinod Kumar Garg Vs. State (Government of National Capital Territory of Delhi), (2020) 2 Supreme Court Cases 88*** has held that the

witnesses are not required to recollect and narrate the entire version with photographic memory notwithstanding the hiatus and passage of time. Picayune variations do not in any way negate and contradict the main and core incriminatory evidence.

In ***Balvir Singh Vs. State of Madhya Pradesh, (2019) 15 Supreme Court Cases 599*** the Apex Court has held that the power of observation differs from person to person witnessing an attack. While the prime event of attack and the weapon are observed by a person other minute details of number of blows, the distance from which the fire was shot might go unnoticed. So long as the evidence of the eye witness is found credible and trustworthy his evidence cannot be doubted on the ground of minor contradictions.

In the case at hand the contradictions/ discrepancies pointed out by the learned counsel for the appellant are the normal discrepancies which may occur due to normal errors of observation, which in our opinion, do not affect the trustworthiness of these witnesses.

The date, time, place and manner of the occurrence, as alleged by the prosecution, find corroboration not only from the statement of P.W. 1 and 2, the witnesses of fact, and by the statement of the formal witnesses P.W. 3 Doctor; P.W. 4 Investigating Officer and P.W. 5 the witness who proved the chik FIR and G.D., but also by the statement of defence witness D.W. 2 the Investigating Officer, who has once again corroborated his earlier statement deposed as P.W. 4 regarding the investigating proceeding ruling out all possibilities of the investigation being tained or otherwise.

After considering all the facts and the circumstances and keeping in view the entire evidence available on the record, all the contradictions and omissions pointed out by the learned counsel for the appellant cannot be termed as major contradictions which could be the basis to discard the whole prosecution story. The evidence of P.W. 1 and 2 is found to be wholly reliable and the evidence of doctor being opinion only cannot be given much importance so as to discredit the eye witness account. The evidence of the doctor to the extent that two injuries of the deceased could not be caused by

one shot is worth ignoring.

It is also pointed out by the learned counsel for the appellant that P.W. 1 stated that at the place of Bhandara, a generator was running and hence the statement of P.W. 4 that in the absence of light the inquest could not be conducted in the night becomes contradictory. It is true that at the place of Bhandara the generator was running at the time of Bhandara but it was installed to manage the feast only, which had ended by 6.00 p.m. The Investigating Officer is said to have reached the spot after 8.00 p.m. and, at that time, it might be possible that the generator was not running so the above statement of P.W. 1 and P.W. 4 cannot be said to be contradictory.

It is also argued by the learned counsel for the appellant that there is contradiction in the statement of P.W. 1, 2 and 4 wherein P.W. 4 stated that P.W. 1 had deposed before him that the accused persons committed the offence after having the feast, whereas both P.W. 1 and 2 had stated that the accused persons came on the spot suddenly and P.W. 2 had specifically stated that it was wrong to say that the accused persons were present at the spot before the incident took place. If we go through the chik FIR, it is mentioned therein that the accused persons came suddenly and fired at the deceased. Though, P.W. 1 in his previous statement under Section 161 Cr.P.C. had stated that at about 6.00 p.m. the present appellant, Rajendra Singh and Rajiv who were present at the spot, came near him and fired at the deceased Subhash. This statement cannot be taken to mean as the accused persons were 'present' at the spot before the time of the incident. The word 'present' may be taken to mean that if the person is present only then he can make a fire. P.W. 1 has not been contradicted in the court about his statement under Section 161 Cr.P.C. and in the court also he had clearly mentioned that the accused persons came suddenly and fired at the deceased. Otherwise also, whether the accused persons were present in the Bhandara before the incident or they came suddenly at the time of incident will not make any difference as it is the prosecution version throughout that the present accused had fired at the deceased.

It is also argued by the learned counsel for the appellant that no empty

cartridges, pellets etc. had been found on the spot so it cannot be said that the incident of firing had taken place at the spot indicated by the prosecution, hence the place of occurrence is disputed by the appellant.

In this regard, when admittedly the shoes and chappals, blood stained and normal soil had been seized from the spot regarding which the FSL report is also on the record indicating human blood in the blood stained soil; P.W. 1 and 2 and P.W. 4 the Investigating Officer have also admitted in their statements that the place of incident was Mahua wala Bag which was 20 kms. away from the village Bagpur. If we go through the site plan, Exhibit Ka-8, in that also the place of occurrence is shown to be Mahua wala Bag near Primary Pathshala, Bagpur. Hence, mere fact that the Investigating Officer did not collect or find the residue of firing this cannot falsify the place of occurrence asserted by the prosecution.

Thus, from the above discussion, it is proved that the witnesses of fact P.W. 1 and 2 have completely supported the prosecution case. Their evidence is found to be trustworthy. Contradictions are minor in nature which do not go to the root of the matter. Though, P.W. 2 can be said to have political rivalry but that too is not proved from the record. In any case, P.W. 1 cannot be said to be inimical to the accused appellant and, thus, there is no reason of false implication of the accused appellant and to leave the real culprits scot free. Hence in the totality of the facts and circumstances of the case, we are of the considered opinion that the conviction of the appellant for the offence under Section 302 I.P.C. suffers from no infirmity. The sentence awarded by the trial court is fully justified being minimum. The impugned judgement and order, therefore, does not call for any interference.

The appeal lacks merit and is liable to be dismissed.

The appeal is accordingly, dismissed.

Certify this judgment to the court below for necessary compliance.

The trial court record be transmitted back immediately.

Order Dated:-21.04.2022

Gss/gp